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In the

Supreme Court of the United States

THE RECTOR, WARDENS AND VESTRYMEN OF SAINT JAMES PARISH IN NEWPORT BEACH, CALIFORNIA, ET AL.

Petitioners,

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF LOS ANGELES, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the California Supreme Court

BRIEF OF THE PRESBYTERIAN LAY COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the California Supreme Court violated the First Amendment's Establishment and Free Exercise clauses by interpreting a state statute to confer a special power on certain religious denominations to create trusts for their own benefit in the real property of affiliated local church corporations, solely by declaring that they have unilaterally enacted a post-hoc internal rule, when no other person or entity has such power under state law?

II. Whether this Court's refereeing in *Jones v. Wolf*, 443 U.S. 595 (1979), to denominational canons and constitutions as potential sources of neutral principles of property law can be read, consistently with the First Amendment, as trumping other secular laws governing property rights?

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INTEREST OF *AMICUS CURIAE*[1]

The Presbyterian Lay Committee respectfully submits the accompanying brief as *amicus curiae* in support of petition for writ of certiorari. The petition was filed on June 24, 2009, and placed on the docket on June 25, 2009. Accordingly, this application is timely under Rule 37 of this Court's Rules.

Established in 1965, the Presbyterian Lay Committee ("Lay Committee" or "PLC") is a non-profit corporation whose mission includes informing Presbyterians about issues facing the denomination and equipping local congregations—and their members—in their interaction with the regional and national entities within the Presbyterian Church (United States of America) ("PC(USA)"). The Lay Committee regularly reports on judicial decisions concerning church property issues and publishes a legal guide regarding disaffiliation and related property-ownership issues: "A Guide to Church Property Law: Theological, Constitutional and Practical Considerations." The Presbyterian Lay Committee is composed of Presbyterian Church members who are concerned with how the property that is purchased with our money is used. As an

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[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than the Presbyterian Lay Committee and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Not less than ten days prior to the due date, the Presbyterian Lay Committee provided counsel of record for all parties with notice of its intent to file this brief.

entity that helps equip lay leaders to maintain the integrity of the Presbyterian denomination, the Lay Committee has a strong interest in this matter.

In the wake of this Court's decision in *Jones v. Wolf*, 443 U.S. 595 (1979), the General Assembly of the PC(USA) unilaterally attempted to assert a trust in its favor over local congregational property, even though legal title to local Presbyterian church property is virtually always held by the local church—and in the name of the local church—alone. Those local churches never assented to the would-be trust. Few, if any, formal property transfers followed in the wake of the General Assembly's unilateral actions. The Lay Committee holds that this unilateral assertion of a trust is inconsistent with the denomination's historical structure of governance. That well-established structure respects the autonomous property ownership and management of and by the local congregations. Unilateral attempts to superimpose a trust on local church property improperly impairs the rights and interests of local congregants, and touches on the abilities of local church fiduciaries to manage and protect church assets according to the considered judgment of local church members.

The United States Constitution forbids preferential treatment of assertions of power by ecclesiastical entities in civil courts resolving purely civil disputes over such matters as title to local church property. Accordingly, title to property held by a local religious corporation should be evaluated in the same manner as property held by any other legal entity. An assertion of a trust by a self-described trust beneficiary cannot properly be

enforced under trust law principles applicable to every other person in civil society. That preferentially idiosyncratic rule should not be enforced merely because the self-described beneficiary occupies, for some purposes, a higher tier in a religious community. Correct enunciation of these principles by this Court will help preserve the basic legal expectations of Presbyterian—and other—congregations throughout the United States. Accordingly PLC respectfully submits its views on the constitutional analysis properly applicable to church property disputes and the ramifications of the competing analyses offered to the bedrock religious freedoms of millions of American Christians.

REASONS FOR GRANTING THE PETITION

The issues raised by this closely-watched case are of utmost importance to the relationship between religious freedom and the judicial function. The religious demographics of the United States have changed dramatically over the last generation. The upshot is this: the principle of hierarchical deference handed down in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), and criticized—but allowed—in *Jones v. Wolf*, 443 U.S. 595 (1979), is no longer constitutionally viable. Some courts explicitly adopt a hierarchical-deference approach, stating that they will defer to the decisions of church hierarchies in all church disputes; other courts, such as the California Supreme Court in the present case, adopt a neutral-principles approach in name only, enforcing documents unilaterally adopted by church hierarchies declaring themselves the beneficiaries of congregational property trusts. The decision of the

California Supreme Court at issue here, claiming to apply neutral principles but in fact applying hierarchical deference, has exacerbated the deepening federal constitutional issues. Confusion abounds, and litigation has exploded. The time is ripe for this Court to reexamine the constitutionally-sensitive principles that govern church property disputes.

I. The Litigation-Triggering Changes In The Nation's Religious Composition Since *Watson v. Jones* And *Jones v. Wolf* Call For Reexamination Of The Hierarchical-Deference Rule.

Religion is deeply rooted in our nation's history and tradition; it is also profoundly significant to—and inseparable from—the beliefs and practices of many citizens across the entire country. Studies show that approximately eighty percent of Americans consider themselves religious.[2] That formidable percentage translates into the practical reality that religion directly touches the lives of approximately 245 million Americans.[3]

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2 Barry A. Kosmin & Ariela Keysar, American Religious Identification Survey 3 (Mar. 2009), *available at* http://www.Americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf; *see also* Pew Forum on Religion & Public Life, U.S. Religious Landscape Survey 5 (Feb. 2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf.

3 U.S. Census Bureau, http://www.census.gov (the population estimate is calculated from the July 6, 2009, population count of 306,850,212 people).

Not only are the American people overwhelmingly religious in their worldview, they are an astonishingly divided community of believers in the transcendent. According to a study by the Pew Forum on Religion & Public Life, the United States is among the most religiously diverse countries in the world. The nation boasts approximately twelve major religious groups, as well as literally hundreds of independent sects and small denominations. Pew Forum, *supra* note 2, at 10. With numerous communities of faith have come deep internal divisions and intra-church strife. These disagreements have led to schisms, realignments, and the formation of new religious communities.[4]

This has been particularly true in the Protestant communities of faith, where the locus of control is not always fixed. Unlike the Roman Catholic Church, or the Church of Jesus Christ of Latter-Day Saints, where property is typically held by a superior body, many mainline Protestant communities allow their congregations to hold title to their property. Jeff Hassler, Comment, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 Pepp. L. Rev. 399, 405-06, 436 (2008). Internecine disagreements within various Protestant communities of faith have often led to property disputes that find their way into

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[4] Cathy Lynn Grossman, *Most Religious Groups in USA Have Lost Ground, Survey Finds*, USA TODAY, Mar. 9, 2009, *available at* http://www.usatoday.com/news/religion/2009-03-09-american-religion-ARIS_N.htm ("Nearly 2.8 million people now identify with dozens of new religious movements....").

secular courts. These disputes have occurred with rapidly increasing frequency in recent years.[5]

Aside from increased litigation due to internal church divisions, immigration has significantly altered the nation's religious composition.[6] Indeed, the country's religious composition is obviously different—and much more diverse—than in 1871 when *Watson* was decided. The issues presented are entirely ripe—and increasingly pressing—for the Court's resolution.

II. Due To Substantial Changes In The Nation's Religious Makeup, Hierarchical Deference Has Become Practically Unworkable And Constitutionally Problematic.

A. Hierarchical Deference Entangles The Courts In Religious Doctrinal Disputes.

When this Court first articulated the principle of hierarchical deference in *Watson*, most church structures fitted neatly into two categories: hierarchical or congregational. That bipolar classification no longer captures the reality of America's vibrantly diverse religious groups. For

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5 A Westlaw search for all state and federal cases discussing "church property" reveals the following figures (appeals are counted separately); from 1950 to 1959, there were approximately 332 cases; from 1960-1969, 343 cases; from 1970-1979, 387 cases; from 1980-1989, 486 cases; from 1990-1999, 569 cases; from 2000-2009, 806 cases. (This search was done Jul. 24, 2009, in the "Allcases" database; hence, the numbers for 2009 are not fully comprehensive).

6 Kosmin & Keysar, *supra* note 2, at "Highlights."

example, among the Christian denominations in the United States today, a host of different organizational structures exist that combine both hierarchical and congregational principles. *See* Hassler, 35 Pepp. L. Rev. at 405-07. In light of that structural reality, some courts have determined that churches can be hierarchical for matters of doctrine and practice, but congregational for purposes of controlling property. *See Kelley v. Riverside Blvd. Indep. Church of God*, 358 N.E.2d 696, 704 (Ill. App. Ct. 1976); *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 241 A.2d 691, 703 (Md. 1968), *vacated and remanded*, 393 U.S. 528 (1969), *aff'd*, 254 A.2d 162, *appeal dismissed*, 396 U.S. 367 (1970); *Smith v. Church of God*, 326 F. Supp. 6, 12 (D. Md. 1971); *Serbian Orthodox Church Congregation of St. Demetrius v. Kelemen*, 256 N.E.2d 212, 217 (Ohio 1970), *cert. denied*, 400 U.S. 827 (1970); *Dragelevich v. Rajsich*, 263 N.E.2d 778, 781 (Ohio Ct. App. 1970).

Over the years, courts have confronted significant difficulties when called upon to classify many faith communities into the bipolar categories of hierarchical or congregational. For example, there is a dispute as to the claimed hierarchical nature of the PC(USA). In particular, as the Presbyterian polity shows, a denomination may have one or more successive bodies with some responsibility for doctrinal consistency over geographic areas encompassing many local congregations, without having authority over economic matters such as property ownership. That an organization may have multiple tiers does not mean that its local congregations are subject to comprehensive hierarchical governance. The classification

difficulties do not end there. Courts have even had to handle cases involving churches with *no* organized form of government. *See Rosicrucian Fellowship v. Rosicrucian Fellowship Nonsectarian Church*, 245 P.2d 481 (Cal. 1952). Consider, too, the case of *Concord Christian Center v. Open Bible Standard Churches*, 34 Cal. Rptr. 3d 412, 423 (Ct. App. 2005), where the parties themselves disagreed over whether the church was congregational or hierarchical; indeed, substantial evidence by both parties pointed toward the validity of each of their respective arguments. *See also Master v. Second Parish of Portland*, 124 F.2d 622 (1st Cir. 1941) (Presbyterian church merged with local congregational church); *Malanchuk v. Saint Mary's Greek Catholic Church of McKees Rocks*, 9 A.2d 350 (Pa. 1939) (local congregation composed of merged congregations from denominations with different governing structures); *Singh v. Singh*, 9 Cal. Rptr. 3d 4 (Ct. App. 2004) (two competing boards in a Sikh Temple, one claiming to be appointed for life, and the other claiming their appointment was for a term only); *Clough v. Wilson*, 368 A.2d 231 (Conn. 1976) (congregation had ambiguous level of loyalty to Plymouth Brethren church leader in England).

Cases such as these, where the locus of control is ambiguous, have beguiled courts into adjudicating questions of religious polity in violation of bedrock First Amendment principles. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976). That constitutional infirmity lies at the heart of the *Watson-Wolf* hierarchical-deference test. The base inquiry under that test is whether the church is in fact hierarchical. But that inquiry can become a snare. "For every Christian church and probably

every religious organization, forms of government relate to doctrine.... In religious institutions, government is not independent of belief; rather, it reflects an understanding of how God relates to human beings and how human beings seek religious truth." Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 Colum. L. Rev. 1843, 1877 (1998); *see also* Kathleen E. Reeder, *Whose Church Is It, Anyway? Property Disputes and Episcopal Church Splits*, 40 Colum. J.L. & Soc. Probs. 125, 130 (Winter 2006).

Not only is the hierarchical *vel non* inquiry fraught with inherent constitutional difficulty, judges are profoundly ill-equipped institutionally to make the ultimate theological judgment whether a church is hierarchical. The problem is further compounded when precedent has been set by a court with one denominational polity before it, and subsequent lower courts improperly apply that ruling to litigants of another denomination. Any court ruling which factors in polity risks imposing that interpretation into other denomination's internal relationships. In the case for which review is now sought, it is clear that California's interpretation of an Episcopal property dispute is worded in a manner broad enough to blanket other purportedly hierarchical denominations.

This problem is apparent from the many inconsistent rulings that dot the judicial landscape. For example, Baptist churches have generally been found to be congregational in nature, *Greenawalt*, 98 Colum. L. Rev. at 1878, yet one modern court classified a Baptist church as hierarchical, *Crumbley v. Solomon*, 254 S.E.2d 330 (Ga. 1979); *see also*

Chrapko v. Kobasa, 114 A. 254 (Pa. 1921) (holding that the Greek Catholic Church was connected with the Roman Catholic Church, despite evidence that the church was independently organized); *Drozda v. Bassos*, 23 N.Y.S.2d 544 (App. Div. 1940) (holding Greek Catholic Church to be an independent congregation, not united with the Roman Catholic Church, despite testimony indicating association); *compare Mullins v. Elswick*, 438 S.W.2d 496 (Ky. 1968) (holding Free Will Baptist church is congregational because its governing power rests with members of the congregation), *with W. Conference of Original Free Will Baptists of N.C. v. Miles*, 129 S.E.2d 600 (N.C. 1963) (upholding a jury determination that a relationship between the local church and a Conference appointed to decide matters of doctrine was enough to show Free Will Baptist churches have a hierarchical structure); *compare Kemp v. Lentz*, 68 N.E.2d 339 (Ohio Ct. App. 1943) (holding Church of the Brethren is congregational, and that sending delegates to national conventions and giving money to parent church does not mean it is hierarchical), *with First Church of Brethren v. Snider*, 79 A.2d 422 (Pa. 1951) (holding Church of the Brethren to be hierarchical because its affiliation with General Conference and all ministers were duly ordained ministers of the Church of the Brethren); *compare Hayman v. St. Martin's Evangelical Lutheran Church*, 176 A.2d 772 (Md. 1962) (local church affiliated with Evangelical and Reformed Church through merger, but still held to be congregational), *with Immanuel Evangelical Lutheran Church v. Fromm*, 116 N.W.2d 766 (Mich. 1962) (holding church to be hierarchical because it "conducted business" as a part of the Evangelical and

Reformed Church). As this illustrative recitation shows, courts find themselves reaching wildly inconsistent results in searching for a sort of jurisprudential Holy Grail. That should not be.

Assuming a church is correctly found to be hierarchical in nature, sensitive problems still emerge. For example, in the litigation at hand, the Episcopal Church claims to be the pinnacle of the hierarchy, yet it in turn is part of the worldwide Anglican Communion. The Primates of the Anglican Church have repeatedly encouraged the Episcopal Church to suspend this litigation, but to no avail.[7] So, to which hierarchy should the courts defer? Should the Archbishop of Canterbury's guidance for litigation-avoidance trump the litigiousness of the American church's current decision-makers? The current—and related—jurisprudence is woefully unclear.

In happy contrast, the neutral-principles approach "obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes." *Jones*, 443 U.S. at 605. In *Jones*, this Court permitted (but did not require) courts to apply the neutral-principles test and expressly noted the numerous advantages of that inquiry. But that was a generation ago. The intervening history over the past thirty years has demonstrated not only the practical advantages of

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7 American Anglican Council, Equipping The Saints: An Educational Resource Produced by The American Anglican Council, 8 (3d ed. March 2009), http://www.americananglican.org/assets/Resources/Equipping-the-saints/Equipping-the-Saints-3AAC.pdf.

neutral principles, but has illuminated as well the constitutional mischief inherent in the hierarchical-deference methodology. A church property rule designed for nineteenth-century, more homogeneous America does not address the constitutional realities posed by religiously diverse twenty-first century America.

B. The Hierarchical-Deference Approach, Whether Adopted Explicitly Or Through State Statutes That Allow The Formation of Unilateral Trusts Over Church Property, Creates Both Unequal Treatment And Preferential Rulings.

The constitutional incoherence of the hierarchical-deference rule, whether adopted explicitly or through deference to unilateral denominational claims to beneficiary status, is manifest. Professor Kurt Greenawalt rightly noted that hierarchical deference "contains an anomaly that is so evidently impossible to justify, it will almost certainly not survive. The anomaly is the different treatment accorded congregational and hierarchical churches once their polity is determined." *Greenawalt*, 98 Colum. L. Rev. at 1866. This gaping inequality has not gone unnoticed in the judicial literature. As the Supreme Court of Kentucky observed in *Bjorkman v. Protestant Episcopal Church in the United States of America of Diocese of Lexington*, 759 S.W.2d. 583, 586 (Ky. 1988): "[I]n every case, regardless of the facts, compulsory deference would result in the triumph of the hierarchical organization." That is surely overbroad—and profoundly wrong. Even in a

situation where members of a local congregation both purchased and maintained property *entirely* with their own tithes, offerings, and other resources, then decided by unanimous vote to separate, the local congregation would lose its property to the general church solely because of its denominational affiliation—and an affiliation frequently created in the distant past. It is difficult in the extreme to identify any parallel in American law.

Equally important, it is peculiarly the members of hierarchical churches who will suffer from this legally-imposed structural inequality. Under the neutral-principles approach,

> [b]ecause congregational churches and their members are dealt with by civil courts on the same terms as secular voluntary associations, aggrieved members may seek civil court protection of certain common-law rights in their relations with the church. Under the hierarchical-deference standard, members of hierarchical or semi-hierarchical congregations, on the other hand, may be deprived of all such rights as long as the denomination determines they should be. Hassler, 35 Pepp. L. Rev. at 428-29 (citation omitted).

This starkly unequal treatment spawns profound constitutional tensions by granting preferential treatment—in civil courts—to some citizens over others. *See* Arlin M. Adams & William R. Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. Pa. L. Rev. 1291, 1294-95 (1980). That should not be.

In addition, the hierarchical-deference approach confers litigation advantages on religious bodies that are not equally afforded to nonreligious associations. As then-Justice Rehnquist, joined by Justice Stevens, stated in dissent in *Serbian Eastern Orthodox*: "To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would create far more serious problems under the Establishment Clause." *Serbian Eastern Orthodox*, 426 U.S. at 734 (Rehnquist, J., dissenting).

In happy contrast to the hierarchical-deference approach, neutral-principles analysis applies the same standards to all religious and non-religious associations. The upshot is this: the latter approach avoids tipping the scales in favor of one litigant over another.

C. Continuing Use Of Hierarchical Deference Has The Potential For Lawlessness And Unfairness.

As (the late-Chief) Justice Rehnquist emphasized in his Serbian Eastern Orthodox dissent, "If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness." *Serbian Eastern Orthodox*, 426 U.S. at 727 (Rehnquist, J., dissenting). In recent decades, bewildering arrays of religious movements have exercised considerable control over their members. Quite apart from the occasional madness of a suicide pact, a hierarchical attempt to take all congregational property through imposition of a

unilateral trust—and to enforce it through the hierarchical-principles theory—is not unlike the actions of some of the new religious movements which unceremoniously appropriate the assets of their members. Our submission in this respect is straightforward: church hierarchies should not be exempt from the normal rules governing the creation and recordation of property interests.

D. The Neutral-Principles Approach Both Embodies Sound Constitutional Principles And Is Highly Practicable In Its Operation.

The neutral-principles approach, as its name suggests, levels the litigation playing field in an admirably practical way. That achieves a vitally important constitutional value. As this Court stated in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 715 (1994), "[a]bsent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." Neutral-principles analysis avoids these constitutional difficulties and works to ensure fairness for all parties.

This Court noted in *Jones* that "the primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity." *Jones*, 443 U.S. at 603. For example, in denominations that are hierarchical for both theological and property purposes, such as the Roman Catholic Church, the potential for property disputes has largely been pretermitted by the vesting of title in the Bishop. *See Hassler*, 35 Pepp. L. Rev. at 405-06. That centralizing, dispute-avoidance tack

is also employed by the Church of Jesus Christ of Latter-Day Saints. *See id.* at 436. These churches would maintain current ownership structures under neutral principles by either holding title or using "appropriate reversionary clauses and trust provisions." *Jones*, 443 U.S. at 603. At the other extreme, a clearly congregational denomination, such as Baptist churches, would continue to have disputes resolved as they have been in the past. All denominations would retain the prerogative through ordinary legal means to determine where property will end up in the event of a split. *Id.* at 603-04.

III. California Corporations Code Section 9142 As Interpreted By The California Supreme Court Establishes Hierarchical Deference And Violates The First Amendment.

The ruling of the California Supreme Court is profoundly flawed. By its decision, our most populous state's highest court has crossed a jurisprudential line that threatens religious freedom. This Court has often stated that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *see also Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Zorach v. Clauson*, 343 U.S. 306 (1952).[8] The California Supreme Court's interpretation of California Corporations Code Section 9142 ("Section

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[8] We recognize fully that *Epperson's* broad statement does not reflect the views of some Members of the Court, but this robust neutrality requirement has loomed large in modern First Amendment jurisprudence.

9142") runs afoul of both of these well-established principles. The statute discriminates between different religious sects and small denominations by favoring hierarchical church structures without a narrowly-tailored means of fostering a compelling interest. Further, it violates the Establishment Clause by advancing religion over nonreligion through an unconstitutional delegation of state power to churches.

A. California Corporations Code Section 9142 Unconstitutionally Advantages Hierarchical Denominations At The Expense Of Congregational Denominations.

As interpreted by the California Supreme Court, Section 9142 inappropriately advantages hierarchical religions over congregational faith communities. It does so by granting only hierarchical institutions the unilateral power to assert trusts over parish properties without the consent of the titleholder. Cal. Corp. Code § 9142(c)(2) (West 2009). In *Larson v. Valente*, this Court held that where a law violates the neutrality principle by discriminating among denominations, it becomes "suspect" and therefore subject to strict scrutiny. *Larson v. Valente*, 456 U.S. 228, 246 (1982); *see also Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987). The test for strict scrutiny requires that there exist a compelling governmental interest to justify the discrimination, and that the law in question be narrowly tailored to further that interest. *Larson*, 456 U.S. at 247.

In adumbrating the analysis, we assume, *arguendo*, that a powerful governmental interest exists in giving a church the power to rule autonomously, in order to prevent judicial entanglement in ecclesiastical matters. Even so, Section 9142 is not narrowly tailored. The same goal can still be achieved by striking part (c)(2),[9] as this particular provision does nothing more than open the door for hierarchical churches to do what no other religious body can do. As written, this portion of the statute is under-inclusive. However, if it were to include congregational churches, it would *still* violate the Establishment Clause because it would give a benefit to all religions that it does not give to similarly situated nonreligious nonprofit associations. The best way to ensure that Section 9142 is aligned with the ideals of the First Amendment is to strike Section (c)(2).[10]

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[9] Cal. Corp. Code § 9142(c)(2) (West 2009) ("(c) No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law unless one of the following applies: (2) Unless, and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide.").

[10] This situation is comparable to those put forth in *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985); and *Larson*, 456 U.S. at 248.

B. California Corporations Code Section 9142 Unconstitutionally Delegates Governmental Decision-Making Authority To Religious Institutions.

Since *Jones*, this Court has consistently held that the government may not delegate decision-making authority to religious institutions. In *Larkin v. Grendel's Den*, 459 U.S. 116, 122 (1982), this Court rejected a state law that gave churches a veto over neighboring applications for liquor licenses, because the law "vest[ed] discretionary governmental powers in religious bodies." Similar to California's Section 9142, the Massachusetts legislature had granted churches a special benefit that it did not grant secular nonprofit organizations. The Court determined that the measure violated the Establishment Clause because it advanced religion by allowing churches to influence government land use regulation. *Id.* at 120.

This is precisely the function of Section 9142's hierarchical deference. It supplants the legislature's well-developed trust law and offers purportedly hierarchical churches—and no other organizations—the power to revoke the property rights of any subordinate parish. Not only does this usurp governmental authority, but it opens the door to the *Larkin* Court's fear that "the churches' power under the statute could be employed for explicitly religious goals." *Id.* at 125. Granting hierarchical religious bodies such untrammeled authority over property rights poses this exact risk, especially when the local churches have not expressly yielded such authority. The power to decide who owns property, a core power of civil government, would be vested in religious

bodies, which can—and will—use that power for their own particularistic purposes, such as to enforce orthodoxy and stifle dissent.

The result in *Larkin* would have been different if the churches' veto power had been included in local covenants, conditions, and restrictions that were voluntarily agreed upon by the surrounding property owners. Under those circumstances, the churches would have enjoyed veto power under neutral principles of contract law. In the same way, a local congregation is free to grant its religious denomination the contractual right to resolve property disputes. Yet, the denomination cannot assume this right without a proper legal instrument executed by the grantor—in this case, the local congregation. Allowing religious organizations to declare unilaterally trusts in their own favor effectively delegates governmental authority to religious institutions, which would then become free to dictate results in a way other parties cannot. This creates a religion-specific framework that binds even entities that have not contractually accepted it. The First Amendment does not allow such a law.

IV. Both Hierarchical Deference And Enforcement Of Unilaterally Adopted Church Property Trust Provisions Are Incongruous With The Expectations Of Congregational Church Donors, Members, And Supporters.

The Free Exercise and Establishment clauses are designed to protect individual liberty. The purpose of anti-establishment structures is to ensure that "We the People" may choose religious affiliations free of governmental influence and coercion.

Similarly, the government may not lawfully interfere with citizens' free exercise rights in order to ensure that people may worship and believe in the manner that they see fit.

For many people, church is fundamentally at the local level. People are connected to the members they attend church with—the people they are baptized, married, and buried among—not the religious hierarchy behind them. In his analysis of the religious expectations of American church members, Professor Greenawalt found that "[m]any Protestants now join a local church that seems suitable, with relatively little concern about the general denomination; they switch denominations freely and, regardless of denomination, may consider the congregational government of the local church as most important." *Greenawalt*, 98 Colum. L. Rev. at 1875. More systematically, a study by the Pew Forum on Religion & Public Life confirms that approximately forty percent of Americans have switched religious allegiance since their childhood. Pew Forum, *supra* note 2, at 5. Thus, it is generally the case that when members donate money, time, or land to their church, they mean for it to support the activities at the local level. When courts operate under standards of hierarchical deference or enforce unilaterally adopted trust provisions, however, those expectations are dashed. Especially in situations like the one at hand, where the congregation voted to leave a denomination by a lopsided vote of 341 to 4 (Pet. Cert. 7); the people donated the land directly to the local congregation (Pet's App. Br. 7); and literally all costs associated with building and maintaining the church property were paid by the very local members who voted to change affiliation (Pet's App.

Br. 9); constitutional freedom demands that the local congregation be allowed to retain its property.

CONCLUSION

For the foregoing reasons, the petition of St. James Anglican should be granted and the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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